United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

In the

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

474

No. 21,949

Raymond T. Davis

Appellant

v.

United States of America

Appellee

No. 22, 208

Kenneth M. Sams

Appellant

v.

United States of America

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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October 8, 1968

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CASES CITED

OTHER AUTHORITIES

* Cases marked with asterisks are those upon which particular reliance is placed.

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BRIEF FOR APPELLANTS

STATEMENT OF THE ISSUES

1. Did the Trial Court commit reversible error in permitting the introduction of a key case taken from appellant Davis at the time of his arrest?

2. Did the Trial Court commit reversible error in failing to grant appellants' motion for judgment of acquittal and in instructing the jury that it could return a verdict of "guilty" for the offense of robbery where there was no evidence presented that there had been any taking from the victim?

This case has not previously been before this Court.

STATEMENT OF THE CASE

Raymond T. Davis and Kenneth M. Sams appeal from a judgment of conviction for robbery (District of Columbia Code §22-2901) after a trial before District Judge William B. Bryant and a jury in the United States District Court for the District of Columbia. Appellants are proceeding in forma pauperis under Rule 24 Fed. R. App. P., pursuant to orders of the United States Circuit Court of Appeals for the District of Columbia Circuit dated May 17, 1968 and August 13, 1968. By order dated August 13, 1968 the Circuit Court of Appeals consolidated these appeals. This Court has jurisdiction under 28 U.S.C. §1291.

On October 31, 1966 at approximately 2:50 p.m. Metropolitan Police Detectives Best and Crockett were in Officer Crockett's private car driving east on K Street, N.W. and observed the appellants, Raymond T. Davis and Kenneth M. Sams, walking southbound together at the intersection of 14th and K Streets, N.W. (tr. 46; 83, 84). Appellants stopped at a D.C. Transit bus stop (tr. 47;84) and were observed by Detectives Best and Crockett who had stopped the car approximately 500 feet from the bus stop (tr. 62). A white male identified as Steve Kavounis, the complaining witness, approached the same bus stop and boarded a northbound bus preceeded by appellant Sams and followed by appellant Davis who, in boarding, "brushed up against" Kavounis (tr. 49). The bus left the stop and proceeded north on 14th Street followed by Officers Best and Crockett in their car. Appellants left the bus

at 14th and Thomas Circle (tr. 49, 88) The police officers then parked their car and approached the appellants. Appellant Davis, seeing Officer Best approaching "began to back away" (tr. 51) and was then held by Officer Best. Appellant Sams ran away after being "grabbed" by Officer Crockett (tr. 88). Appellant Davis, who had been placed under arrest, was searched, and a key case was recovered from his right rear pocket (tr. 52). The key case had previously been identified as belonging to Steve Kavounis (tr.34) and was subsequently introduced and received as Government's Exhibit 1 (tr.54).

Kavounis, after leaving work on October 3, 1966, had waited for his bus at 14th and K Streets, N.W. at approximately 3 p. m. (tr. 30). His key case was in his left rear trousers pocket. He boarded the bus at 14th and K Streets, N. W. and alighted at 14th and Thomas Circle. When he arrived home, he found that his keys were missing (tr. 32). During the period from entering the bus to reaching his home Kavounis neither felt nor noticed anything unusual (tr 32, 33, 39) and thought that he had lost his keys (tr. 33).

STATEMENT OF POINTS

1. There was no probable cause to arrest either of the appellants. Therefore, the subsequent search of appellant Davis was illegal and objects seized from Davis may not be used as evidence in this prosecution or in the prosecution of the co-defendant, Sams

2. No evidence was introduced at trial establishing that anyone took a key case from the person or from the immediate actual possession of the complaining witness, Kavounis. Therefore, it was error for the trial court to deny appellants' motion for judgment of acquittal and to allow the jury to return a verdict of guilty of robbery.

SUMMARY OF ARGUMENT

Officers Best and Crockett had no warrant to arrest either of the defendants. Furthermore, there was no probable cause to arrest them. Therefore, their arrest was illegal and consequently any objects seized from either of the appellants, specifically one key case, should have been suppressed and not have been permitted to be introduced at trial.

Substantial evidence of the occurrence of each of the elements of an offense must be introduced to allow the case to go to the jury. Robbery, as defined by the District of Columbia Code, §22-2901, requires evidence of a taking from the person or immediate actual possession of another of anything of value "by sudden or stealthy seizure or snatching, or by putting in fear." No evidence was presented at trial showing any form of taking from Kavounis, the complaining witness.

At the close of the Government's case, defendants moved for judgment of acquittal. This motion should have been granted for there was a complete failure of proof of an essential element of the offense with which the defendants were charged. The Court permitted the jury to return a verdict of guilty for

the offense charged. Such a charge without the necessary evidence allowed the jury to speculate as to defendants' guilt.

ARGUMENT

1. THERE WAS NO PROBABLE CAUSE TO ARREST DEFENDANTS. THEREFORE, THE ARTICLES SEIZED SHOULD HAVE BEEN SUPPRESSED.

A pretrial motion was made by the defendants to suppress, inter alia, one brown leather key case and keys, seized on the occasion of defendants' arrest, October 3, 1966. The motion was denied. Although the motion was not renewed at trial, defendants have standing to raise the issue before this Court. Waldron v. United States, 95 U.S. App. D. C. 66, 69-70, 219 F. 2d 37, 40, 41 (1955); Cogen v. United States, 278 U.S. 221, 223 (1929); Gouled v. United States, 255 U.S. 298, 312, 313 (1921); Lawn v. United States, 355 U.S. 339, 353 (1958).[1/]

There is no doubt that a search may be justifiable as incident to a lawful arrest. Agnello v. United States, 269, U.S. 20 (1925). However, if the arrest is not lawful, articles seized incident to that arrest may not be used by the Government in a subsequent prosecution of the defendant. Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959); Bynum v. United States, 104 U.S. App. D. C. 368 (1959), 262 F.2d 465.

1/ Although the object seized and subsequently introduced in evidence was taken from defendant Davis, both defendants have sufficient standing to object to its introduction at trial for each would be equally prejudiced. McDonald v. United States, 335 U.S. 451 (1948); Nelson v. United States, 93 U.S. App. D.C. 14,23, 208 F.2d 505, 514 (1953), cert. denied. 346 U.S. 827 (1953); Hair v. United States, 110 U.S. App. D.C. 153, 289 F.2d 894 (1961); Schoeneman v. United States, 115 U.S. App. D.C. 110; 317 F.2d 173 N. 5 (1963).

An arrest is not lawful if made without a warrant and there is no probable cause to believe the persons arrested were violating or had violated the law. D.C. Code §4-140 (1967); Henry v. United States, supra. Evidence required to establish guilt is not necessary, Brinegar v. United States, 338 U.S. 160 (1948) but good faith on the part of the arresting officers is not enough. The standard is whether prudent men in the shoes of the arresting officers have seen enough to permit them to believe that the person or persons arrested were violating or had violated the law. Brinegar v. United States, 338 U.S. at 175; Henry v. United States, 361 U.S. at 102.

The question, therefore, is whether Officers Best and Crockett, acting as reasonable, cautious police officers, had probable cause to believe Davis and Sams had committed a crime at the time they were arrested. Taking the evidence most favorable to the Government, the following is the situation confronting the officers at the time of the arrest: The officers knew both Sams and Davis as "pickpockets" (tr. 44). They saw defendants approach a bus and stop together (tr. 46), whereupon defendants separated and stood perhaps 15 feet apart (tr. 48). A bus approached the stop and Sams entered the bus followed by a man (Kavounis) who in turn was followed by Davis who in running up to the bus bumped into that man. Sams stopped by the driver with his hand across the aisle. Davis again brushed the man (tr. 48,49,86, 87,88).

The defendants got off the bus approximately two blocks later by different exits (tr. 49). The officers stopped their car and approached the

defendants. As Sams walked by Officer Crockett, he was "grabbed" by Officer Crockett (tr. 89). Officer Best, "placed his hands" on Davis at approximately the same time (tr. 51). When the physical grabbing of the defendants occurred, they were then arrested, Kelly v. United States, 111 U.S. App. D.C. 396; 298 F.2d 310 (1961). Defendants contend there was no probable cause to arrest them and therefore, the key case, seized as an incident to an unlawful arrest, should not have been permitted to be used in evidence.

At the worst, this conduct is suspicious;[2/] in fact, it is perfectly innocent conduct. Two known pickpockets approach a bus stop together, separate, and then board a bus so that a stranger is placed between them. They depart from the bus two blocks later by separate exits.[3/] These are the facts that were before the officers when they arrested defendants. Undoubtedly, the officers suspected that defendants had picked the "sandwiched" man's pocket. The officers did not see the pocket picked and no complaint was filed by Kavounis. Defendants submit that it was an unreasonable and imprudent action on the part of the officers to arrest defendants. If defendants

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2/ Probable cause to arrest a person without a warrant means more than a bare suspicion, Stephens v. United States, 106 App. D.C. 249; 271 F.2d 832 (1960).

3/ Defendants' attempted "flight" occurred after the arrest. Furthermore, it appears to be a justifiable attempt. It was only after attempts were made to "grab" defendants that the attempted flight occurred. Considering that the officers were in plain clothes and had emerged from a civilian car, it is not surprising that defendants reacted in the manner in which they did.

had no records, their conduct would undoubtedly be considered innocent. With a criminal record, is their conduct such as to warrant arrest? If so, this would mean that anyone with a previous criminal record would be arrested at will. This is not the law. See, Beck v. Ohio, 379 U.S. 89, 97, (1964).

II. NO EVIDENCE WHATSOEVER OF TAKING FROM THE PERSON BY SUDDEN OR STEALTHY SEIZURE OR SNATCHING, OR BY PUTTING IN FEAR WAS INTRODUCED. THE LACK OF THIS ESSENTIAL ELEMENT REQUIRED A JUDGMENT OF ACQUITTAL AND ALLOWING THE JURY TO RETURN A VERDICT OF GUILTY ON THE INDICTMENT PRESENTED IS REVERSIBLE ERROR.

The crime of robbery for which defendants were indicted is set out in the D. C. Code §22-2901 wherein it is provided:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery. . .

Although this statute is a departure from the common-law crime of robbery in that it includes "the stealthy seizure or snatching", Turner v. United States, 57 App. D. C. 39, 16 F.2d 535 (1926), the prosecution bears the same burden of proving this element as it does all other elements of the crime. Jones v. United States, 124 App. D.C. 83, 361 F.2d 537, 542 (1966), Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965).

There has been no showing of any taking from the "victim"; therefore, the trial court should have granted the defendants' motion for judgment of acquittal, Fed. R. Crim. P. 29, and should not have permitted the jury to return a verdict on the robbery indictment. There was no direct evidence

that either of the defendants intentionally took the key case from the possession of the "victim" nor was there sufficient evidence to support an inference that either intentionally had done so. 4/

The standard a court must follow in passing upon a motion for judgment of acquittal is outlined in Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, 323 (1947), cert. den. , 331 U.S. 837 (1947).

> The true rule, therefore, is that a trial judge in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

4/ The following instruction by the trial judge tended to encourage the jury to overlook this lack of evidence:

> The Court instructs you that if you find beyond a reasonable doubt that the defendant was in exclusive possession of property of the complainant and that this property had recently been stolen, and the defendant's possession of property on the day in question and under the circumstances in question has not been satisfactorily explained then you may, if you see fit to do so, infer therefrom that the defendant is guilty of either one of the crimes that I have described to you (tr. 330).

Such a charge "implies that all elements of robbery, including that of a forceful taking, can be presumed from the fact of possession. Such possession, however, supports only the inference that the defendants took the property belonging to the owner; that such taking was accomplished in a manner which amounted to robbery must be established by independent evidence." Vaughn v. United States, Nos. 21,066, 21,067 N.1 (May 2, 1968, opinion not published in U.S. App. D.C. or F.2d).

The evidence taken in the light most favorable to the Government, "did not establish a basis for a reasoned finding, surpassing speculation, that beyond all reasonable doubt" a robbery was committed. Austin v. United States, 127 App. D.C. 180; 382 F.2d 129, 139 (1967). A jury may not be permitted to speculate on the question of guilt without clear evidence on all essential elements of the offense in question. Campbell v. United States, 115 U.S. App. D.C. 30, 32, 316 F.2d 681, 683 (1963) (citing Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954)).

The record lacks any evidence direct or indirect which establishes that either of the defendants took anything from the victim. On the contrary, the evidence presented by the Government suggests that it was impossible for defendants to have done what they were accused of doing at the time they were accused of doing it.

The complainant testified that it was not until he arrived home that he noticed his key case was missing (tr. 32) and throughout the time he was on the bus he noticed nothing unusual (tr. 33). He thought he had lost his keys (tr. 33). Both police officers testified that, although Davis was close enough to reach the complainant (tr. 48, 87) and perhaps bumped him (tr. 48), Davis' hands appeared to be in his pockets (tr. 49, 87). The fact of possession of the key case could be innocent; at worst, it could be evidence of petit larceny.

The decisions of this Court in Hunt v. United States, 115 U.S. App. D. C. 1, 316 F.2d 652 (1963) and Vaughn v. United States, supra, are on point and require that the decision be reversed.

In Hunt the complainant was subjected to the normal jostling of a bus stop crowd. On entering the bus she noticed that her purse was open and her wallet was missing. She looked through the bus window and noticed defendant shaking hands with his co-defendant. She alighted from the bus at the first stop and, accompanied by two police officers, proceeded toward the spot where she boarded the bus. She saw the appellant and his co-defendant, who immediately began to run. The police gave pursuit and arrested both the appellant and his co-defendant. The co-defendant threw the complainant's wallet in the gutter a few feet from the place where the arrest was effected.

The Court stated in Hunt that there was insufficient evidence to allow the case to go to the jury on a charge of robbery:

> Robbery, as defined by the statute, requires proof of a taking from the person of another "by sudden or stealthy seizure or snatching, or by putting in fear." There is here no substantial evidence to show that the offense committed was robbery as distinguished from larceny. Every fact proved by the Government is as consistent with larceny--the lesser offense--as with robbery. Under the circumstances, the case should not have been submitted to the jury on the greater offense. 115 U.S. App. D.C. at 4, 316 F.2d at 655.

The decision of this Court in [illegible] v. United States, 118 U.S. App.

D.C. [illegible] (1962) [illegible] on

point and [illegible]

[illegible] of a

bus [illegible] was open

[illegible] and [illegible]

defendant [illegible]

[illegible] two police [illegible]

[illegible]

defendant [illegible]

arrest [illegible]

the [illegible]

[illegible]

[illegible] charge [illegible]

> [illegible] statute, [illegible] taking [illegible] the person of another by sudden or stealthy [illegible] snatching, or by putting in fear [illegible] [illegible] substantial evidence to show that [illegible] [illegible]

In Vaughn, there was testimony tending to prove that the appellants attempted to rob the complainant of his wallet, that there was a scuffle during which the complainant could have lost his watch, and that the watch was later found in the car with the appellants. One of the appellants testified without contradiction that he found the watch on the ground after the struggle between appellant Vaughn and the complainant, and the complainant himself never stated that he knew how or when he lost the watch. The Court, citing Hunt, reversed the robbery convictions and ordered a new trial on the lesser offense.

CONCLUSION

For the foregoing reasons the conviction of robbery should be reversed and the indictment dismissed.

Respectfully submitted,

William W. Scott
Attorney for Defendants
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 1968 a copy of this brief was mailed by first class mail, postage prepaid, to Frank Q. Nebeker, Assistant U.S. Attorney, U. S. Court House, Washington, D.C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,949

RAYMOND T. DAVIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 22,208

KENNETH M. SAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
HARVEY S. PRICE,
Assistant United States Attorneys.

ISSUES PRESENTED*

In the opinion of the appellee, the following issues are presented:

1. Where police officers experienced in the operations of pickpockets see two men engage in a series of acts characteristic of pickpocketing while boarding a bus with the victim, and then see the two men leave the bus two stops later, may the officers arrest these men whom they believe have just committed a crime; and may personal property, which the victim carried in his rear pants pocket and which was found on one suspected pickpocket when he was arrested immediately after leaving the bus, be used as evidence against both defendants at their trial for robbery by means of pickpocketing?

2. Under the circumstances related in question one, may the trial court properly deny defendants' motion for acquittal based on insufficiency of the evidence, and permit the jury to return a verdict of guilty of robbery as charged?

*This case has not previously been before this Court.

227-448-68

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked with asterisks.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed October 31, 1966 appellants were charged with robbery, 22 D.C. Code § 2901, of one key case from the complainant, Steve Kavounis. At trial on February 27, 28 and 29 and April 18, 1968, before United States District Court Judge William B. Bryant sitting with a jury, appellants were convicted of robbery and sentenced to terms of three to ten years.

At the trial the following was brought out:

On October 3, 1966 at approximately 2:50 p.m. Metropolitan Police Detectives William A. Best and Leroy N. Crockett, assigned to the robbery squad, were cruising the Northwest area of Washington, D.C. in Sergeant Crockett's private car, looking for shoplifters (Tr. 42, 47). It was a hot afternoon (Tr. 38). The officers observed appellants, Raymond T. Davis and Kenneth M. Sams, known to them as pickpockets, walking together, side by side, towards the intersection of 14th and K Streets, N.W. (Tr. 44, 46, 85). Despite the warm weather, both appellants were wearing trench coats (Tr. 66).

The officers continued to watch appellants and observed the following:

As appellants approached the bus stop they separated, Sams going to the bus stop sign, Davis walking to the park area behind the bus stop and leaning against a tree (Tr. 84). Three or four minutes later a northbound bus approached the bus stop. Following two other persons the complainant started to board the bus when appellant Sams rushed up to the door, stepped in front of complainant, and boarded the bus directly ahead of him. Appellant Davis then came hurriedly from across the park as if he were going to miss the bus and, though no one was pushing him, bumped into Mr. Kavounis. Appellant Sams stopped at the driver's seat, placing his arm across, and thereby blocking, the aisle. At this point complainant was sandwiched between Sams and Davis, unable to move. Davis brushed up against Mr. Kavounis, with his coat draped over the complainant. (Tr. 48, 49, 87.)

The bus proceeded north on 14th Street, followed by Officers Best and Crockett in their car. Appellants left the bus at 14th Street and Thomas Circle, two stops later. Sams exited by the center door, Davis by the front door. The police officers, neither of them in uniform, parked their car and approached appellants. (Tr. 47, 49, 88.) Officer Best saw what he thought was a wallet in Davis' right hand (Tr. 50). Seeing Officer Best, appellant Davis began to back away and place something in his right rear pocket. He struggled with Officer Best who held and arrested him. Sergeant Crockett called appellant Sams by

name and tried to grab him, but Sams ran away, leaving his coat and hat, and escaped. (Tr. 51, 52, 89.)

Appellant Davis was searched at the scene of his arrest and a keycase, belonging to Steve Kavounis and containing his identification, was taken from Davis' right rear pocket (Tr. 52). The keycase had been in Mr. Kavounis' possession for about ten years. He recalled being pushed when getting on the bus, (Davis was the only person behind him) but thought nothing of it (Tr. 32).

On October 20, 1967, some four months prior to trial, Judge Bryant held a hearing in which he denied appellant Davis' motion to suppress introduction of the keycase taken from him at the time of his arrest.[1] At the trial, the keycase was introduced, without objection, as Government's Exhibit No. 1 (Tr. 54). Appellants did not testify or offer any other evidence in their own behalf. In his charge to the jury, Judge Bryant instructed them that the evidence permitted findings of (1) innocence; (2) guilty of robbery (22 D.C. Code § 2901); or (3) guilty of the lessor included offense of petit larceny (22 D.C. Code § 2202). (Tr. 330–332.) The jury returned a verdict of guilty of robbery, from which the defendants now appeal.

ARGUMENT

I. The trial court did not err in permitting the introduction of a keycase taken from appellant Davis at the time of his arrest since the arresting officers had the requisite probable cause for arresting Davis, and the seizure of the keycase was permissable in view of the lawful arrest.

(Tr. 44, 49, 51, 84, 87).

Probable cause for arrest exists where a police officer "in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Jackson* v. *United States,* 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962);

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[1] Appellants have not chosen to include the transcript of this hearing as part of the record for this appeal. In view of this fact and the adequacy of the record on appeal, the Government is satisfied to argue the probable cause issue from the facts that appear on the record of this Court.

accord, Brinegar v. *United States,* 338 U.S. 160 (1949); *Dixon* v. *United States,* 111 U.S. App. D.C. 305, 296 F.2d 427 (1961).

The facts in this case show that Officers Best and Crockett had ample grounds for their belief that appellants had just committed a crime, thereby justifying appellants' arrest and the seizure and introduction of the keycase at trial. The totality of appellants' behavior presented the portrayal of a pocket-picking which men even less experienced than Officers Best and Crockett would not have failed to recognize.

Here two men previously walking together, separate at a bus stop with Sams standing at the bus stop sign while Davis stands neither at a conversational distance nor more than 35 to 40 feet away (Tr. 84). As the complainant tries to enter a bus, Sams pushes in front of him, then blocks his further motion (Tr. 87, 49). Davis hurriedly comes up behind complainant and bumps him, a completely unnecessary motion, after which he pushes up closely behind complainant and drapes his trenchcoat, which he was now carrying on this hot day, over complainant's back (Tr. 87). Appellants then leave the bus by different exits some two stops later (Tr. 49).

This characteristic behavior, as interpreted by experienced officers, would in itself have been sufficient probable cause for arrest. *Dixon* v. *United States, supra.* In addition, the officers knew that Davis and Sams were prone to picking pockets (Tr. 44). And as the officers in mufti approached them, appellants both tried to leave hastily, Sams literally running out of his clothes (Tr. 51). The total picture presented to the police constituted a very typical case of pickpocketing. Their prompt arrest of appellants was justified and to be encouraged.

Appellants cite *Stephens* v. *United States,* 106 U.S. App. D.C. 249, 271 F. 2d 832 (1960)[2], (Br. 7) for the proposition that probable cause to arrest without a warrant means more than

[2] In *Stephens,* the police had reasonable grounds to believe that certain premises, for which they carried a search warrant, were being used in a lottery operation. The court held that there was probable cause for Stephens' arrest, he being the only male found on the premises. Stephens, who was totally unknown to the police, was trying to leave hastily when they arrived. If the facts of *Stephens,* where defendant was not observed doing anything that appeared criminal, rise above bare suspicion, that appellation would be most inapt here.

a bare suspicion. To say that appellants' conduct permitted the officers only a bare suspicion of criminal conduct would be to vitiate the standard of practical considerations, guided by experience, explicit in the *Jackson, Brinegar* and *Dixon* cases.

Appellants contend (Br. 8) that had they no criminal record, their conduct would have been considered innocent. Thus, they feel that anyone with a criminal record may be arrested on a policeman's whim. *Beck* v. *Ohio*, 379 U.S. 89 (1964) is cited as not permitting such a result. There is no basis in fact, however, for appellants' claim. Appellants' proclivity for pocketpicking was one portion of the sum of circumstances that police were entitled to weigh in deciding whether they believed a crime had been committed. The totality of appellants' actions themselves, however, would hardly have been considered innocent by experienced police officers and would, even without the support provided by knowledge of appellants' past, have comprised the requisite probable cause. *Beck* is distinguishable because while the police had received unspecified information that Beck was guilty of gambling violations, they arrested him without observing any conduct that even suggested criminality.

II. The trial court did not err in denying appellants' motion for acquittal and allowing the jury to return a verdict of guilty of robbery since adequate evidence was presented by the Government to support such a finding.

(Tr. 49, 52, 84, 87, 322, 324, 325, 330, 331)

Viewing "the evidence" in the light most favorable to the Government's position," *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332, 334 (1967), the record of this case amply supports Judge Bryant's decision that sufficient evidence was introduced on every element of the crime of robbery (22 D.C. Code § 2901) to permit a reasonable mind to fairly conclude guilt beyond a reasonable doubt. The phrase, in § 2901, "sudden or stealthy seizure or snatching," was not part of the common law definition of robbery, and makes clear the legislators' intention to categorize pocketpicking as robbery as op-

posed to simple larceny. *Turner* v. *United States*, 57 U.S. App. D.C. 39, 16 F.2d 535 (1926).[3]

While no one testified at trial to the actual transfer of the keycase from complainant to Davis, the Government contends that sufficient evidence was adduced to support an inference that appellants (Davis as principal actor, Sams as abettor) intentionally took the property from complainant. The totality of evidence—the separation (Tr. 84), Sams' abruptly getting in front of complainant (Tr. 87), his blocking the aisle (Tr. 49), Davis' unnecessary touching of complainant and his draping his trench coat over complainant (Tr. 49, 87), the rapid departure by appellants via separate exits (Tr. 49), the subsequent possession of the keycase by Davis (Tr. 52) which no one at trial made any attempt to explain—substantially supports the inference that appellants carried into execution their plan to rob complainant by picking his pocket. *Jackson* v. *United States*, 123 U.S. App. D.C. 276, 359, F.2d 260, *cert. denied*, 385 U.S. 877 (1966).

In *Jackson* (1966) *supra*, a conviction of robbery was upheld regarding a wallet snatching where no one at trial could testify to having witnessed the taking. A woman was waiting at a bus stop when someone yelled to her that her wallet had been snatched. She then saw her purse open with wallet missing and saw a man running. Others pointed him out saying "That's the man," although the basis of their information is unclear. Upholding defendant's conviction, the court distinguished *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963), (Br. 11) by calling *Hunt* an unusual case where there was a reasonable inference that the wallet fell to the ground rather than being taken from the person. The court stated, at page 261:

> "[In this case there are] no proven factual circumstances from which it could be inferred, by some reasoning going beyond mere speculation, that the wallet had fallen."

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[3] In *Turner*, where a wallet was snatched from out of the victim's pocket, the court held that a robbery conviction was not precluded by the victim's failure to realize that he had been robbed. Also, the "force and violence" phrase of the statute was held satisfied by any physical taking of property from the person however nonviolent and without the victim's knowledge.

That argument is equally persuasive in our case.

The Jackson court also stated, at page 262:

> "The sufficiency of the evidence is manifest when this testimony is coupled with the evidence that appellant was at the bus stop and was found to have the stolen money in his possession."

Hunt, supra, is further distinguishable from our case since no contact of any type between defendant and victim was shown there, while appellant Davis not only was seen in bodily contact with the complainant but the nature of that contact was characteristic of pocketpicking.

Appellants suggest that the inference of the taking from the accumulated evidence is not permissible, but is instead mere speculation. They cite *Austin* v. *United States,* 127 U.S. App. D.C. 180, 382 F.2d 129 (1967) (Br. 10) for that proposition. *Austin* is inapposite, however, since it deals with an entirely different magnitude of uncertainty. *Austin* held only that a conviction of first degree murder must be reduced to second degree where the victim was stabbed fifty-two times, suggesting a violent frenzy rather than premeditation, and there was no showing of prior threats or quarrels which could support an inference of premeditation and deliberation.

Finally, appellants mention in a footnote that Judge Bryant's charge to the jury (to which charge they do not formally object in their brief) encourages the jury to find guilt of robbery without evidence of a "taking." That charge, however, is exemplary.[4] Judge Bryant states several times that each of the five elements constituting robbery, which he has enumerated and explained, must be proven for a conviction (Tr. 322, 325, 330, 331). The element of the taking from the person is unequivocally explained (Tr. 322, 324). Immediately following

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[4] At its conclusion the Court decided, on the instigation of the prosecutor, to give a further clarification between larceny and robbery. Counsel for appellant Sams made no objection to the Court's charge, and agreed that the further clarification outlined by it would be appropriate. Counsel for appellant Davis stated "No objections, no requests." (Tr. 337)

the "Trachtenberg charge" concerning recently stolen property,[5] to which appellants object, the court stated:

> "You are not required to make such an inference from the possession, but you may do so if you deem it appropriate * * *.
>
> "[and] * * *.
>
> "Remember that I outlined for your consideration five elements in the offense of robbery and I have told you in order to reach a conclusion of guilt on such an offense you must find each one of those elements present" (Tr. 330).

Thus Judge Bryant explicitly informed the jury that conviction was impossible without evidence of the taking. The "Trachtenberg charge" had recently been approved in this Circuit at the time of appellants' trial in a purse snatching case. *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 720 (1966).

Vaughn v. *United States*, D.C. Cir. Nos. 21,066, 21,067, (Br. 9) decided May 2, 1968, after appellants' trial, was a violent robbery case. Its holding is merely that where defendant has testified without contradiction that he came upon a violent struggle and found a watch on the ground, and where there is no independent evidence that either defendant took the watch from the person of the victim, the evidence is insufficient for a robbery conviction. On those facts, the court said in a footnote that the "Trachtenberg charge" enabled the jury to span the gap in the evidence. *Vaughn* is inapplicable to our case since there was independent evidence of a taking, since no evidence was introduced at trial to suggest any counter theory, and since the court's charge in its totality obviated any jury misunderstanding.

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[5] Set out by appellants in a footnote (Br. 9), this is a single paragraph in the context of a lengthy charge which, even if it were objectionable in itself, does not stand alone.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,949

RAYMOND T. DAVIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 22,208

KENNETH M. SAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

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REPLY BRIEF FOR APPELLANTS

I. THE GOVERNMENT HAS MISCONSTRUED THE FACTS IMMEDIATELY PRECEEDING THE ARREST OF APPELLANTS.

There is some disagreement between the Appellants and the Government as to the facts that occurred immediately preceeding the Appellants' arrest. It is Appellants' contention that the sum of these facts do not constitute probable cause for arrest; therefore, a key case seized as incident to that arrest should have been suppressed.

It is conceded that on October 3, 1966 Davis and Sams were walking together towards a bus stop at the intersection of 14th and K Streets, N.W., in Washington. At the bus stop they separated. The complaining witness entered a northbound bus preceeded by Appellant Sams and followed by Appellant Davis. Appellant Sams stopped adjacent to the driver and placed his hand across the aisle.

The Government concludes that Appellant Sams intentionally blocked further entrance and motion of the complainant after both persons boarded the bus. There is no testimony to this effect and such a conclusion is mere conjecture. To the contrary the evidence establishes that the procedure in boarding was quite routine. (tr. 32,33,38,39)

The Government further states that Appellant Davis hurriedly came up behind the complainant and bumped him. It concludes that this was a completely unnecessary motion. The complaining witness, however, states that only the usual pushing of a packed bus took place. (tr. 32) Referring to the testimony of Officer Crockett, the Government concludes that Appellant Davis then draped his trench coat over complainant's back. The specific testimony is as follows:

> Davis came up behind Mr. Kavounis and he had his hands in what appeared to be in his pockets or had his hand up and he had on a top coat and he walked up and pushed up behind and he seemed to sort of drape his coat over his back. (tr. 87)

The question is, whose back? Normal English construction indicates that the coat was over Davis' back and not over the back of the complaining witness as the Government contends. Officer Best's testimony

indicates that Davis' coat was draped over the complaining witness. (tr. 49,77) Any doubt should be resolved in favor of the Appellants.

The Appellants then left the bus at 14th and Thomas Circle. The Government states that this was two stops later. The only reference to stops in the record is Government counsel's opening statement to the effect that counsel would prove that Appellants left the bus one stop later. (tr. 25) It is conceded, however, that the Appellants' ride on the bus was of short duration.

On these facts alone the Government asserts that probable cause for arrest was present because of "characteristic [criminal] behavior" citing Dixon v. United States, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961). There is no similarity between the behavior of the Appellants in the instant matter and that of the defendants in Dixon. In Dixon, the facts were as follows: two police officers were cruising in a car at about midnight and noticed two men in an Oldsmobile, one of whom was a known safebreaker. The officers followed the Oldsmobile and saw a man on the curb beckon to the two men. Following a brief conversation, the two men departed in the Oldsmobile down a side street followed by the man who beckoned. The car pulled in front of a Plymouth that was parked and when the officers next observed the two men the trunks of both the Plymouth and the Oldsmobile were open. Four men, including Dixon, were standing on the curb beside the Plymouth. The officers parked next to the Plymouth and one of them approached the four men. As he did so, one of the men on

the curb threw something down. The officer observed, inside the trunk of the Plymouth, a fur piece with either a price tag or label attached to it. The article which was thrown upon the ground was recognized by the officer as a garment. The officer inquired of the four men as to the owner of the garment. Receiving no reply he picked the garment up and observed that it was a lady's suit with the price tags still attached. Receiving no reply to his further question as to ownership, the officer arrested the four men.

In finding that an arrest was justified the Court stated:

> Four men, one known to be a safebreaker, meeting upon signal, handling women's clothes, including a fur piece, bearing price tags or labels, on the curb of a narrow street at midnight, could well induce a reasonably prudent police officer to conclude that a larceny, robbery, housebreaking or some similar offense had been, was being, or was about to be committed. 296 F.2d at 429.

The sum total of events in Dixon indicate a substantially greater degree of criminal behavior than the facts related in the instant matter. Yet on the facts noted herein the Government asserts probable cause existed for arrest. There is no similiarity between the two fact situations.

Does separation at a bus stop indicate criminal behavior? Does the failure to board in tandem indicate criminal behavior? Does a short bus ride indicate criminal behavior? Individually or collectively, the facts cannot be said to amount to the characteristic behavior of someone who has committed or is about to commit a felony.

The Government goes on, however, and cites the fact that the officers knew Davis and Sams were prone to picking pockets. This, a criminal record, is the only common fact in Dixon and the instant matter. Does a criminal record cause otherwise innocent conduct to become the characteristic behavior of one who has committed or is about to commit a felony? The answer again must be "No."

In an effort to add another fact to the sum of the events so as to achieve the requisite probable cause the Government points to the Appellants' attempted flight. It is obvious, however, that this "flight" occurred after arrest [1/] and not before and, therefore, cannot be considered as a basis for probable cause. [2/]

II. THE LACK OF EVIDENCE AS TO ANY "TAKING" FROM THE VICTIM REQUIRES REVERSAL.

Appellants rely on Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963) and Vaughn v. United States, D.C. Cir. Nos. 21,066, 21,067 (May 2, 1968). Under the facts of this case there was insufficient

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1/ Sams was "grabbed" as he started to walk past Officer Crockett (tr. 88). Davis attempted to "struggle" as Officer Best "was about to place his hands on" Davis. (tr. 51) When the physical grabbing of the Defendants occurred, the arrest occurred. Kelly v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961).

2/ The appellants' flight was justifiable. Considering that the officers were in plain clothes, had emerged from a civilian car and had made attempts to "grab" appellants, it is not surprising that appellants reacted as they did.

evidence to allow the case to go to the jury on a charge of robbery. The record lacks any evidence, direct or indirect, which establishes that either of the Appellants took anything from the victim. The only time that Appellants were close enough to "take" anything from the complaining witness was on boarding the bus. Yet from all the evidence presented it appears that it was impossible for the principal actor, Davis, to take the property in question.[3/]

The Government seeks to distinguish Hunt as an unusual case and Vaughn as a violent robbery case. Hunt is further distinguished by the Government's notation that no contact with the complaining witness was present in Hunt whereas Appellant Davis actually bumped into the complaining witness in the instant matter.[4/] Hunt stands for the proposition that there must be some evidence showing a taking in order to submit a robbery case to a jury. A jury may not be allowed to specualte as to the circumstances under which property of one person came into possession of another. At the only moment of proximity between the complaining witness and

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3/ The complainant testified that it was not until he arrived home that he noticed his key case was missing. (tr. 32) Both police officers testified that although Davis was close enough to reach the complainant (tr. 67,87), and perhaps bumped him (tr. 48), Davis' hands appeared to be in his own pockets. (tr. 87,94,95) The fact of possession of the key case could be innocent; at worst, it could be evidence of petit larceny.

4/ Although the complaining witness in Hunt was not shown to be in contact with the defendant, she was shown to have been subject to the normal jostling of a bus stop as was the complainant herein. (tr. 32) 316 F. 2d. at 653.

Appellant Davis, it was impossible for Davis to take the property in question. In Vaughn there was testimony tending to prove an attempt to take one article and testimony establishing possession of another article of the complaining witness. Nevertheless, relying on Hunt, the Court reversed the robbery convictions for the lack of evidence as to an actual taking.

The Government principally relies on Jackson v. United States, 123 U.S. App. D.C. 276, 359 F.2d 260, cert. denied, 385 U.S. 877 (1966). Certainly the facts in Jackson are readily distinguishable. As the Court noted:

> Here there was a group of people around the bus stop, but no evidence of any jostling or pushing of the victim, and no proven factual circumstance from which it could be inferred, by some reasoning going beyond mere speculation, that the wallet had fallen. . . . In addition, there is the unchallanged testimony by the victim that someone actually saw the defendant take the wallet out of the victim's purse. That testimony is hearsay, says appellant. But the victim was on the stand and could testify as to the yelling and calling she heard since these were spontaneous exclamations admissible within a well known exception to the hearsay rule, sometimes referred to by the catch-all "res gestae" phrase, 359 F.2d at 261, 62.

Clearly evidence of a taking was present in Jackson. The Government, attempting to relate the facts in Jackson to the instant case, states that in Jackson as in the case before this Court "no one at trial could testify to having witnessed the taking." (Brief at 6) The above quoted portion of the decision in Jackson discredits the analogy.

CONCLUSION

For the foregoing reasons the conviction of robbery should be reversed and the indictment dismissed.

Respectfully submitted,

William W. Scott
Attorney for Appellants
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 1968 a copy of this brief was mailed by first class mail, postage prepaid, to Frank Q. Nebeker, Assistant U.S. Attorney, U.S. Court House, Washington, D.C.

William W. Scott

UNITED STATES COURT OF APPEALS

for the

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SUGGESTION OF APPELLANTS FOR HEARING IN BANC

Appellants hereby suggest pursuant to Rule 35 of the Federal Rules of Appellate Procedure that a hearing in banc is appropriate on the ground that consideration by the full court is necessary to secure uniformity of its decisions. On February 19, 1969 a three-judge panel of this Court affirmed appellants' jury conviction for robbery. Appellants submit that affirmance is contrary to this Court's

holding in Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963) and Vaughn v. United States, Nos. 21,066, 21,067 (D.C. Cir. May 2, 1968).

The facts as related by the Court of Appeals in the instant matter are as follows:

> At approximately 2:50 p.m. on October 3, 1966, Detectives Best and Crockett, who were driving a private car and dressed in plain clothes pursuant to their assignment to the robbery squad of the Metropolitan Police Department, observed Appellants, who were known to them to be pickpockets, walking toward an intersection. Both Appellants wore trench coats on the warm afternoon, and upon reaching a bus stop, they stopped and separated. The detectives halted their car and observed that when a bus approached Appellant Sams entered in front of the victim while Davis followed directly behind him and "bumped into him." Sams stopped at the driver's seat and blocked the path; as the victim stopped, Davis "brushed up against [the victim]."
>
> Alerted by these observations the officers followed the bus in their car and shortly thereafter the detectives observed the Appellants leaving the bus through separate doors. The detectives parked and approached the Appellants. Seeing them, Davis "began to back away" but was held by Detective Best and placed under arrest. Detective Crockett called Appellant Sams by name but was unable to apprehend him as he fled. Davis was searched and a key case, later identified as one the victim has been carrying in a rear trouser

> pocket, was recovered from Davis' right rear pocket. Although the victim remembered being pushed while entering the bus, he thought nothing of it at the time and did not discover the loss until he arrived at home.

Appellants argued that there was insufficient evidence of a "taking" to permit a robbery instruction.

In Hunt the complainant was subjected to the normal jostling of a bus stop crowd. On entering the bus she noticed that her purse was open and her wallet was missing. She looked through the bus window and noticed defendant shaking hands with his co-defendant. She alighted from the bus at the first stop and, accompanied by two police officers, proceeded toward the spot where she boarded the bus. She saw the appellant and his co-defendant, who immediately began to run. The police gave pursuit and arrested both the appellant and his co-defendant. The co-defendant threw the complainant's wallet in the gutter a few feet from the place where the arrest was effected.

The Court stated in Hunt that there was insufficient evidence to allow the case to go to the jury on a charge of robbery:

> Robbery, as defined by the statute, requires proof of a taking from the person of another "by sudden or stealthy seizure or snatching, or by putting in fear." There is here no substantial evidence to show that the offense committed was robbery as distinguished from

> larceny. Every fact proved by the Government is as consistent with larceny -- the lesser offense -- as with robbery. Under the circumstances, the case should not have been submitted to the jury on the greater offense. 115 U.S. App. D.C. at 4, 316 F.2d at 655.

In Vaughn, there was testimony tending to prove that the appellants attempted to rob the complainant of his wallet, that there was a scuffle during which the complainant could have lost his watch, and that the watch was later found in the car with the appellants. One of the appellants testified without contradiction that he found the watch on the ground after the struggle between appellant Vaughn and the complainant, and the complainant himself never stated that he knew how or when he lost the watch. The Court, citing Hunt, reversed the robbery convictions and ordered a new trial on the lesser offense.

In the instant decision this Court distinguishes Vaughn by stating that an alternative theory for the defendants' possession of the property was present. This alternative theory could only be obtained in the instant matter by requiring appellant Davis to have testified at trial to explain why he had possession of the key case. Failure to explain adequately possession would apparently permit an instruction on robbery.

In Hunt where defendant testified, the Court did not rely on an alternative theory for defendants' possession of the property in question. Rather the Court held that possession alone is not sufficient to warrant a robbery instruction. A greater quantum of evidence is required.

The question therefore is whether there was that greater quantum of evidence in this matter. The Court did not discuss nor distinguish Hunt. The Government, in its brief, sought to distinguish Hunt as an unusual case and as a case where there was no contact between the complaining witness and defendants. Granted the complaining witness in Hunt was not shown to be in contact with the defendant, but she was shown to have been subject to the normal jostling of a bus stop as was the complainant herein. Furthermore, the defendants in Hunt were shown to be at the same bus stop as the complainant at approximately the same time. (316 F.2d at 655)

In its decision, the Court cites Jackson v. United States, 123 U.S. App. D.C. 276, 359 F.2d 260 cert denied, 385 U.S. 877 (1966) for the proposition that the evidence met the demands of the statute. Appellants respectfully submit that the facts in

Jackson are distinguishable for there was clear evidence of a taking. As the Court noted:

> [T]here is the unchallenged testimony by the victim that someone actually saw the defendant take the wallet out of the victim's purse. That testimony is hearsay, says appellant. But the victim was on the stand and could testify as to the yelling and calling she heard since these were spontaneous exclamations admissible within a well-known exception to the hearsay rule, sometimes referred to by the catch-all "res gestae" phrase. 359 F.2d at 261, 262.

Conclusion

Accordingly, appellants suggest that a hearing in banc is appropriate.

Respectfully submitted,

William W Scott

WILLIAM W. SCOTT
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1969 a copy of this brief was mailed by first class mail, postage prepaid, to Frank Q. Nebeker, Assistant U.S. Attorney, U. S. Court House, Washington, D. C.

William W Scott